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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-477

WEST SIDE WOMEN'S SERVICES, INC.
AND
RICHARD J. DERMAN, M.D., INC.
Petitioners,

VS.

CITY OF CLEVELAND, OHIO
CITY COUNCIL OF CLEVELAND, OHIO
LOUIS CIVITTOLO, DENNIS KUCINICH
ROBERT E. GETZ, RALPH J. PERK
AND
THOMAS M. KEANE
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

On October 20, 1977, Petitioners West Side Women's Services, Inc. and Richard J. Derman, M.D., Inc. filed suit against the City of Cleveland, several of its officers and councilmen. In the Complaint, West Side Women's Services, Inc.

alleged that it would operate that part of an abortion service providing non-medical procedures and that Dr. Derman would constitute that part of the abortion service performing medical procedures, said abortion clinic to be situated at an address located within an area zoned as a "local retail business district." The Complaint further alleged that Section 231.09 of the Codified Ordinances of Cleveland, Ohio, 1976, violated 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution because it prevented the operation of abortion services in local retail districts. The Petitioners requested preliminary and permanent injunctive relief, a declaratory judgment, damages and costs. They filed a Motion for Preliminary Injunction concurrently with the Complaint.

On February 23, 1978, the district court held an evidentiary hearing on the Motion for Preliminary Injunction. At that hearing, Petitioners strenuously argued that the compelling state interest test should be applied to the contested ordinance while Respondents urged that the rational basis test was the appropriate standard because the challenged ordinance does not interfere with the abortion decision.

On March 1, 1978, the district court issued a Memorandum Opinion and Order denying Petitioners' Motion for Preliminary Injunction. The court held that the movants had failed to demonstrate a probability of success on the merits. The court consequently found it unnecessary to consider the remaining conditions precedent to the granting of a pre-

liminary injunction,[1] although extensive testimony had been offered by Ms. Patricia Steenblock, a representative of West Side Women's Services, Inc., in an effort to establish the element of irreparable harm.[2]

On March 28, 1978, Dr. Derman and West Side Women's Services filed a Notice of Appeal, Motion for an Expedited Hearing and Appellants' Brief. They urged the United States Court of Appeals for the Sixth Circuit to apply the compelling state interest test to the challenged ordinance. The Court scheduled an expedited hearing and oral arguments were presented on June 22, 1978.

On August 15, 1978, the court of appeals affirmed the judgment of the district court stating that "there has been an insufficient showing that the trial court abused its discretion in denying preliminary injunctive relief" and indicating that it could not render

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1 Memorandum Opinion and Order, West Side Women's Services, Inc., et al. vs. City of Cleveland, et al., No. C77-1112, slip op. at 5 (N.D. Ohio, March 1, 1978).

2 Therefore, should this Court find that the district court abused its discretion in concluding that West Side Women's Services was not substantially likely to succeed on the merits, it would be necessary to remand the case for consideration of the remaining three elements of preliminary injunctive relief.

even a tentative judgment on the merits of the case upon the limited facts before it. The appeals court ordered the district court to expedite the hearing on the merits.

Rather than pursue the expedited hearing in the district court, Dr. Derman and West Side Women's Services have chosen to petition this Court for a writ of certiorari to review the extremely narrow and limited decision of the court of appeals.

CITY ORDINANCES INVOLVED

The relevant ordinance sections are Section 231.09 and Section 343.01 which is the section of the Zoning Code defining "local retail business districts."

Section 231.09 reads as follows:

> 231.09 Prohibition Against Issuing Abortion Service License In Local Retail District
>
> Notwithstanding any other provision of the Codified Ordinances of the City of Cleveland, no license, required under the provisions of Section 231.06 of the Codified Ordinances of the City of Cleveland, shall be issued for an abortion service to be located in a local retail business district as set forth in Section 343.01 of the Codified Ordinances of the City of Cleveland, and no abortion service shall operate in a local retail business district.

Section 343.01 provides in pertinent part as follows:

> 343.01 Local Retail Business District.
>
> (a) Defined.
>
> As used in this Zoning Code, "Local Retail District" means a business district adjacent to or surrounded on at least three sides by Residence Districts in which such uses are permitted as are normally required for the daily local retail business needs of the residents of the locality only.
>
> (b) Permitted Buildings and Uses.
>
> The following buildings and uses are permitted in a Local Retail Business District; no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses, and there shall be no display of goods in front of a setback building line.
>
> * * *
>
> (3) Business offices: real estate, insurance and other similar offices, and the offices of the architectural, clerical, engineering, legal, dental, medical or other established recognized professions but excluding morticians, undertakers

> and funeral directors, in which only such personnel are employed as are customarily required for the practice of such business or profession and not exceeding a total of five persons at any one time.
>
> (Emphasis Added)

* * *

The plain language of Section 343.01 of the Codified Ordinances of Cleveland, Ohio, 1976, demonstrates that Petitioners have misstated the first and second questions presented to this Court. They assert that all other dental, medical or other professional offices may be situated in local retail buiness districts and that all other forms of minor outpatient surgery except abortions may be performed; however, the words of the ordinance impose limitations on the nature of medical offices or facilities which may operate in a local retail business district.

By definition, a "local retail business district" is an area in which there are allowed only "such uses ... as are normally required for the daily local retail business needs of the residents of the locality only." Section 343.01(a) of the Codified Ordinances of Cleveland, Ohio, 1976. Additionally, although medical offices are listed as a permitted use, not all medical offices are permitted, but only those "in which only such personnel are employed as are customarily required for the practice of such business or profession and not exceeding a total of five persons at any one time." Section 343.01(b)(3), of the Codified Ordinances of Cleveland, Ohio 1976. Therefore, while it is correct to say that some medical

offices may operate in local retail districts, it is certainly not correct to say that "any other medical office" may operate in such area. Thus, the language of Section 343.01 eliminates Petitioners' equal protection and substantive due process challenges.

REASONS FOR DENYING THE WRIT

I

THE WRIT SHOULD BE DENIED BECAUSE THE MOTION FOR PRELIMINARY INJUNCTION SOUGHT TO BE REVIEWED WAS ADDRESSED TO THE TRIAL COURT'S DISCRETION AND THE INCOMPLETE RECORD DOES NOT SUPPORT A FINDING THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION.

A motion for a preliminary injunction is always addressed to the trial court's discretion. Yakus vs. United States, 321 U.S. 414 (1944). "Injunction is an equitable remedy which should not be lightly indulged in, but used sparingly and only in a clear and plain case." Plain Dealer Publishing Co. vs. Cleveland Typographical Union No. 53, 520 F. 2d 1220, 1230 (6th Cir. 1976), cert. denied, 428 U.S. 909 (1976). This Court has characterized the standard to be applied in determining whether a plaintiff is entitled to a preliminary injunction as "stringent." Doran vs. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

Because a motion for preliminary injunction is addressed to the court's discretion, the standard for review of the denial of said motion is whether the court abused its discretion.

Brown vs. Chote, 411 U.S. 452, 457 (1973); Keyes vs. School District No. 1, Denver, Colorado, 396 U.S. 1215, 1216 (1969). In McBee vs. Bomar, 296 F.2d 236, 237 (6th Cir. 1961), the court stated that "... when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached..." The determination that the trial court abused its discretion depends on a finding that the lower court has made a serious error and not merely that the reviewing court disagrees. El Dorado and W. Ry. Co. vs. Chicago R.I. and P. Ry. Co., 5 F. 2d 777 (8th Cir. 1925).

In the instant case, with due regard for the above principles, the United States Court of Appeals for the Sixth Circuit stated that it was "particulary reluctant to disturb that judgment [of the district court] in the absence of a clear showing of abuse." The court of appeals found no such abuse of discretion in the limited record below and indicated its reticence to order relief which, if granted, would interfere with the operation of a municipal ordinance "with the attendant issues of comity and federalism at stake."

Similarly the issuance of a writ of certiorari would not be appropriate in this case because as in many others in which review of an interlocutory order is concerned the exhaustion of the appellate procedure from the temporary determination would interfere with the orderly, sequential operations of the judicial process and because the record available upon interlocutory appeal is incomplete.

According to Rule 19 of the Rules of the Supreme Court, a review on writ of certiorari "is not a matter of right and will be granted only when there are special and important reasons therefor." This Court has stated that an even more rigorous standard should be applied when the appeal is taken from an interlocutory order and that it will not grant the writ unless it is necessary "to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." American Construction Co. vs. Jacksonville, Tampa and Key West Ry., 148 U.S. 372, 384 (1893). Petitioners have not met this rigorous standard.

II

THE DISTRICT COURT'S RULING IS COMPLETELY CONSISTENT WITH THIS COURT'S ANALYSIS IN MAHER vs. ROE, 432 U.S. 464 (1977), WHILE FULLY IN ACCORD WITH THE PRINCIPLES OF ROE vs. WADE, 410 U.S. 113 (1973), SENDAK vs. ARNOLD, 429 U.S. 968 (1976) (PER CURIAM) AND MOORE vs. CITY OF EAST CLEVELAND, OHIO, 431 U.S. 494 (1977).

Respondents recognize that a woman's freedom to arrive at the abortion decision is a fundamental constitutional right, Roe vs. Wade, supra; Doe vs. Bolton, 410 U.S. 179 (1973), and that the City of Cleveland cannot enact an ordinance which effects an absolute bar or an undue interference with the abortion decision, unless there is a compelling state interest. However, Respondents also claim that the challenged ordinance does not constitute any interference

with the abortion decision, and that therefore the compelling state interest test is not applicable.

In Maher, this Court, in effect, set forth a continuum upon which all abortion-relevant regulations should be analyzed. It explicitly stated that only those regulations which constitute a complete or substantial interference with the abortion decision are to be judged by the stringent compelling state interest test rather than the rational basis test. [3]

Section 231.09 does not interfere with the abortion decision. There are existing abortion facilities licensed to operate within the City of Cleveland[4] and the ordinance does not prevent the opening of additional facilities. The facilities which now operate or which may operate in Cleveland may be located in hospitals or may be independent, free-standing clinics. The ordinance merely forbids such facilities in one type of narrowly-defined neighborhood: a limited commercial area adjacent to or surrounded by residences on at least three sides.

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[3] A chart which graphically illustrates the court's analysis in Maher was utilized for discussion purposes at the preliminary injunction hearing. This illustration was attached to Brief of Defendants-Appellees in the court of appeals and it is attached hereto as Respondents' Exhibit "A".

[4] Petitioners have stipulated to the fact that there are licensed abortion services within the City of Cleveland. Affidavit of Joyce E. Redon, appended to the City's Brief in Opposition to Plaintiff's Motion for Preliminary Injunction as Exhibit "B".

The challenged ordinance is different from the regulations struck down in Moore, Roe, and Sendak. In Moore vs. City of East Cleveland, supra, a city ordinance which prevented certain family members from living together in a single household was declared invalid because it intruded into the fundamental "freedom of personal choice in matters of marriage and family life ..." Moore vs. City of East Cleveland, Ohio, 97 S. Ct. 1932, 1935 (1977). Thus, the East Cleveland ordinance impermissibly interfered with a fundamental right.

Similarly, the abortion regulations contested in Roe vs. Wade, supra, and Sendak vs. Arnold, supra are unlike the Cleveland ordinance because these regulations also immediately, directly, and impermissibly interfered with the protected abortion decision. No regulation could constitute a greater interference with the right to decide on abortion than the statute at issue in Roe which criminalized the performance of an abortion.

This Court's affirmance in Sendak vs. Arnold, supra, of the lower court's decision declaring an Indiana statute unconstitutional is also consistent with the Maher analysis. The Indiana statute was infirm because it required first trimester abortions to be performed in a hospital or in a facility offering the same basic safeguards as a hospital. These requirements were so elaborate that, as a practical matter, they prevented the performance of first trimester abortions in non-hospital settings. The statute created a blanket prohibition on one of two types of facilities (hospital or independent clinic) in which the abortion decision could be effectuated.

Moore, Roe, and Sendak all involved enactments which impermissibly interfered with the exercise of a fundamental right. Section 231.09 does not result in such an undue interference. On the contrary, logic dictates that if ever there were a regulation which does not have an impermissible impact on the abortion decision, Section 231.09 is the regulation. The ordinance does not intrude upon the personal deliberations of the pregnant woman, nor does it affect the type of facility in which a woman may obtain an abortion. The ordinance simply requires that the abortion service not be located in a modest commercial district which is surrounded on three sides by residential neighborhoods.[5] Thus, Section 231.09 should be judged, as are other legislation enactments, by the rational basis test. It is a proper exercise of the police power by the City.

---

[5] A fuller record will reveal that this ordinance is not a subterfuge for prohibiting abortion services in the City or in a substantial area of the City or on the West Side of town. Respondents intend, at trial, to establish for the record the limited area of the City which is designated "local retail business district."

CONCLUSION

For the reasons stated above, Respondents urge that the Petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(b), Rules of the Supreme Court, I hereby certify that three copies of Respondent's Brief in Opposition were served upon the following counsel of record, by depositing same in the United States mail, postage prepaid on this _____ day of _____, 1978:

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ANALYSIS OF REGULATIONS AFFECTING THE FIRST TRIMESTER ABORTION DECISION
BASED UPON THE DEGREE OF INTERFERENCE WITH THE EXERCISE OF THE PROTECTED RIGHT

COMPELLING STATE INTEREST TEST		RATIONAL BASIS TEST	
Continuum of Interference			
Prohibition	Undue Interference	Allowable Interference	No Interference
Texas's criminal prosecution of doctor who performs abortion except to save life (Roe)	Georgia's J.C.A.H. accreditation requirements (Doe)	informed consent by pregnant woman (Danforth)	no medicaid reimbursements for elective abortions (Maher); (Beal)
spousal consent (veto power) (Danforth)		recordkeeping requirements ("may be a resource relevant to decisions involving medical experience and judgment") (Danforth)	
parental consent (veto power) (Danforth)		parental consent in case of possible "mature child"; abstain to allow possible constitutional application by state court (Bellotti)	city hospital's refusal to provide [free] elective abortions (Poelker)

SOURCE: Maher vs. Roe
432 U.S. 464
(1977)

APPENDIX

CLEVELAND ORDINANCE